Filed 7/29/20 P. v. Allen CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
MELVIN ALLEN, JR.,
Defendant and Appellant.

A155167

(Alameda County Super. Ct. No. 18CR004371)

ORDER MODIFYING OPINION AND DENYING REHEARIG NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on July 7, 2020, be modified as follows:

1. On page 5, first sentence of second full paragraph, delete the word "bust" and replace it with "bus." The sentence should read:

   Andre further testified that while he was at the bus stop that night, he heard voices, but he could not remember if the voices were raised in argument.

2. On page 11, after the first partial paragraph, insert the following new paragraph:

   The relevant surveillance video footage from Camera 7, played for the jury at trial, shows the following. First, two people Candace had identified as her and appellant are visible walking in the street from left to right. When they reach the sidewalk at the street corner, appellant reaches toward Candace as a man, identified as

Johnson, comes into view, walking briskly towards them from the direction they had just come. Approximately ten seconds after appellant first reaches for what appears to be a jacket that Candace has been holding, he turns and starts to walk down the adjacent sidewalk, with Johnson, who by now is just behind him, following. After taking three or four steps, appellant turns around and walks backwards about six steps before stopping, dropping the jacket, raising his arm, and pointing at Johnson from close range. Johnson immediately turns around and bends over before walking a number of feet with his hand over his chest, ultimately falling face down into the street. Meanwhile, appellant has picked the jacket up off the ground and started walking away down the sidewalk, along with Candace, who had been standing in the street nearby since giving appellant the jacket.[5]

3. At the end of the new paragraph on page 11, after the sentence ending ". . . giving appellant the jacket" add as footnote 5 the following footnote, which will require renumbering of all subsequent footnotes:

[5] Earlier, after the exchange of the jacket with appellant, Candace appears to take off an outer garment. After they both leave the corner, a dark piece of clothing is visible on the ground where they had just been standing.

4. On page 21, beginning with the first full paragraph and the sentence "First as to evidence . . ." delete this and following paragraphs through the last full paragraph on page 23. Replace those paragraphs with the following four paragraphs:

First, as to evidence of *planning*, in interview statements and trial testimony, Candace indicated that in response to Johnson shaking his tent, appellant grabbed his jacket and rushed out of the tent to go after Johnson. She also said that appellant took off his jacket just before the initial fight with Johnson and gave it to her to hold. Later, according to Candace**'s** police statement, when appellant realized that Johnson was following them, he said, " 'give me my jacket. Give me my jacket.' " She gave him his jacket, which she believed contained the gun, and then, " 'all of a sudden, he turned around and shot [Johnson].' "

Appellant's conduct—initially arming himself with a gun, which was likely concealed inside the jacket he took with him when he left the tent to go after Johnson; later demanding the jacket back from Candace when he realized that Johnson was following them; and then**,** as shown in the surveillance video, taking at least 10 seconds to get the jacket and start walking down the sidewalk now closely followed by Johnson, turning to face Johnson, walking backwards a number of steps, stopping, taking aim, and shooting Johnson in the chest from close range—all provides evidence of planning activity from which a jury could infer that he considered the possibility of using the gun from the time he first left his tent and that he had decided to shoot Johnson when he told Candace to give him his jacket, after becoming aware that Johnson was following them. (See, e.g. *People v. Romero* (2008) 44 Cal.4th 386, 401 [defendant bringing a weapon to location of shooting demonstrated planning activity]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["That defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter' "]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [evidence of planning activity included defendant "carrying a loaded gun with him at the time of the incident," recognizing victim from a prior altercation, and throwing his gang sign and yelling his gang name before opening fire on victim's truck].)

Appellant argues that this case is different from others involving a defendant arming himself before a killing because, here, appellant "was armed during Johnson's initial aggression, and requested his jacket for protection as he was returning to his tent when Johnson aggressed him a second time. . . . [T]here was no time for reasoned reflection given the sequence of rapidly-occurring events." First, appellant's presentation of possible alternative scenarios and mental states, even assuming the jury could have reasonably made such inferences, does not negate the substantial evidence of planning presented at trial. (See *Brady*, *supra*, 50 Cal.4th at p. 565 ["The mere *possibility* of a contrary finding as to defendant's mental state does not warrant a reversal of the guilt judgment"].)

In addition, that appellant demanded his jacket, which contained the gun, a short time before the shooting does not show a lack of premeditation and deliberation. (See *Brady*, *supra*, 50 Cal.4th at p. 561 [process of premeditation does not require an extended period of time and true test is not duration of time, but extent of reflection].) Rather, as already noted, the evidence shows that appellant purposefully brought the jacket containing the gun when he first went to confront Johnson, the person who shook his tent. His subsequent conduct, after the first altercation when he learned that Johnson was following him, included the demand for his jacket, taking over 10 seconds to get the jacket from Candace and walk a few steps before

turning around, walking backwards, stopping, pulling out the gun, aiming, and shooting Johnson in the chest. All of these actions are consistent with appellant having the opportunity to reflect and making a decision to shoot Johnson before he did so. (See *ibid*.) Accordingly, we find there was substantial evidence that appellant planned to murder Johnson. (See *Brady*, at pp. 561–562.)

5. In the last partial paragraph of page 23, through the first portion of page 24, delete the entire text before the *Halversen* citation, and insert the following:

Third, as to *manner of killing* evidence, Candace's and Andre's statements and testimony, as well as the autopsy and surveillance video evidence, demonstrate that, as Johnson followed appellant and Candace, appellant demanded and obtained his jacket from Candace at the corner of West Grand and Brush, and then walked backwards as Johnson approached before raising the gun and shooting him in the middle of the chest from close range. Considering their wrestling match a few minutes earlier, which appellant won handily, there was no apparent reason for appellant to be concerned that Johnson had a gun or was a threat. Rather, the evidence shows that appellant positioned himself in a way that enabled him to lift the gun, take aim, and shoot directly at a vulnerable part of Johnson's body from close range, which is sufficient to support a finding that the manner of killing reflected premeditation and deliberation.

6. On page 30, in the second sentence of the last partial paragraph, delete "in the park" and add the word "again" The sentence should read:

There was not even a hint that Johnson was in possession of a weapon throughout the encounter between the two men, including when Johnson approached appellant again, when appellant pointed a gun at him, or when appellant then shot him in the chest at close range.

There is no change in the judgment. The petition for rehearing is denied.

Dated:_____ _____

Kline, P.J.

Filed 7/7/20 P. v. Allen CA1/2 (unmodified opinion)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MELVIN ALLEN, JR., Defendant and Appellant.	A155167 (Alameda County Super. Ct. No. 18CR004371)

Melvin Allen, Jr. was convicted following a jury trial of first degree murder. On appeal, he contends (1) his murder conviction violated his constitutional right to due process because it was based on the uncorroborated testimony of an accomplice; (2) the trial court erred when it failed to instruct the jury sua sponte that the testimony of an accomplice must be corroborated by independent evidence and should be viewed with caution; (3) his first degree murder conviction must be reversed because there was insufficient evidence of premeditation and deliberation; (4) the court erred when it failed to instruct the jury sua sponte on voluntary manslaughter as a lesser included offense of murder, under the theories of imperfect self-defense and heat of passion; (5) the court abused its discretion when it denied his new trial motion based on spectator misconduct; and (5) the cumulative effect of the various errors deprived him of due process and a fair trial. We shall affirm the judgment.

PROCEDURAL BACKGROUND

On April 10, 2018, appellant was charged by information with one count of murder. (Pen. Code, § 187.)[1] The information also alleged that he had personally and intentionally discharged a firearm in the commission of the offense. (§§ 12022.7, 12022.53.)

On July 25, 2018, at the conclusion of a jury trial, the jury found appellant guilty of first degree murder and found the firearm allegation true.

On August 22, 2018, the trial court denied appellant's motion for new trial and sentenced him to 50 years to life in prison.

Also on August 22, 2018, appellant filed a notice of appeal.

FACTUAL BACKGROUND

This case arises from the shooting death of Dominique Johnson on the night of December 23, 2017. At appellant's trial, the following evidence was presented.

Oakland Police Officer Daniel Breznick testified that on December 23, 2017, around 10:25 p.m., he responded to a dispatch of a shooting on Brush Street between San Pablo and West Grand Avenues in Oakland. He was familiar with that area, where there is a freeway overpass, as well as a park and a tent encampment in the triangle made by the three streets. When Breznick arrived at the scene, there was a group of people standing over a person lying facedown in the street. The person, who was unresponsive and had no pulse, had a single gunshot wound to the center of his chest, with a possible exit wound on the right side. Breznick performed CPR on the person until paramedics arrived at the scene.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

The parties stipulated that an autopsy of the victim, Dominique Johnson, revealed that the cause of death was a single gunshot wound to the chest, with an entrance wound mid-sternum and an exit wound on the right, lateral side of the back.

Oakland Police Sergeant Bradley Baker, a homicide detective who was assigned to investigate the shooting, testified that he was called to the scene on the night of December 23, 2017, where he observed an expended shell casing from a firearm, a black, hooded sweatshirt, a white T-shirt, and apparent blood spatter at several locations. The black sweatshirt was found at the corner of West Grand and Brush and the blood spatter was located mid-block on West Grand between San Pablo and Brush, moving along West Grand toward Brush Street.

Baker collected surveillance video footage from nearby businesses with cameras and found that two cameras had captured the shooting from different angles. Video footage from both cameras was played for the jury. Camera 2 showed the intersection of West Grand and Brush, as well as the park area. Camera 7 showed two figures in dark clothing walking from left to right, approximately 10:25 p.m. The black sweatshirt appeared on the street corner less than a minute later. It had been dropped by one of the two figures shown walking in the video.

Bonnie Cheng, an Oakland Police Department criminalist, testified as an expert in the field of comparing DNA samples. The crime lab processed the black sweatshirt related to the homicide of Johnson; samples taken from the front collar and left cuff were fully tested for DNA. Cheng determined that the two samples contained DNA mixtures of at least two individuals, including one major and one minor contributor on the front collar. Cheng conducted a statistical analysis of the DNA profile from the front collar and

was able to determine that the major donor's profile would be expected to occur in the population approximately "once in 2 nonillion" (i.e., 30 zeroes following a 2) individuals. The frequency of the DNA profile from the left cuff of the sweatshirt was "1 in 690 octillion" (i.e., nine zeroes following 690). Cheng compared a DNA sample taken from appellant with the major donor from the front collar of the sweatshirt and found that his sample was consistent with the sweatshirt sample. Cheng was unable to obtain a full DNA profile of the minor donor.

These results indicated that appellant was most likely the "habitual wearer" of the sweatshirt. There was, however, no way to determine if he was the last person to wear the sweatshirt before testing. The person who wears an article of clothing is more likely to leave more DNA on it than someone who merely handled it briefly. The DNA of Candace C. (appellant's girlfriend) was not compared with any of the DNA found on the sweatshirt.

Andre S., who testified that he would not be in the courtroom if he were not under a court order to appear, had been part of the homeless community living near the scene of the shooting for about five years. Andre had "heard of" a woman named Candace who hung around that area in December 2017. He did not know appellant personally, but had seen him around and heard him called Melvin. On the night of December 23, 2017, Andre was at a bus stop near the intersection of West Grand and San Pablo in Oakland. From the bus stop, he was only partially able to see the area of Brush and West Grand because there were bushes between him and that area. He noticed a lot of police activity in the area and learned that someone had been shot. Before the police arrived, he did not hear any yelling or arguing coming from the area of West Grand and Brush. He had seen appellant in the area earlier that day, but did not see him that night before the police showed up.

Andre acknowledged being interviewed at Santa Rita Jail by Sergeant Baker on February 1, 2018. After the prosecutor played portions of an audio recording of the interview, Andre acknowledged that even before Baker explained why he was there, Andre said, " 'this must be about Melvin and what's her name.' " He also acknowledged telling Baker that he was at the bus stop at San Pablo and West Grand when he heard and saw " 'Mel and dude fighting.' " He testified that he told Baker he had heard a sound that could have been either a shot or a car backfire. He acknowledged hearing himself say "shot," but not "backfire," in the recording of the interview played at trial.

Andre further testified that while he was at the bust stop that night, he heard voices, but he could not remember if the voices were raised in argument. He did not see any altercation from the bus stop because he was facing the wall with his back to San Pablo, receiving oral copulation. He further testified that he told Baker he heard a shot because he "wanted to impress him" since he was in custody at the time. Baker did not offer him any leniency, however. When the prosecutor asked if he told Baker that when he heard the voices, "Mel, [Candace], and dude were standing in the middle of the park on the West Grand side across from the storage building," Andre responded, "I don't remember my exact words, but I made up something that night to impress the officer . . . ." He no longer recalled if he told Baker that those three people were the only ones he saw in the area.

After playing more of the audio recording of the February 1, 2018 interview with Baker, Andre acknowledged that he "might have said" that he had known Mel for over a year. He also identified photos Baker had shown him as being of Mel and Candace. When shown a map on which someone had circled an area in "the middle of the curb line at West Grand in front of the

park," Andre agreed that was where he had indicated to Baker that Mel, Candace, and the other man were standing when he saw them. Andre also acknowledged having an exchange during the interview in which Baker asked, " 'Did she get mixed up with these two when they were beefing,' " to which he responded, " 'I don't know. Somebody said it might have been over her. I'm not sure. [¶] Question: Okay. But you didn't see her fighting with him or anything like that? [¶] Answer: No. [¶] Question: Did you see any punches throwing between them [*sic*] or anything like that? [¶] Answer: No.' "

On cross-examination, Andre testified that people who live in tents in the area near where the shooting took place sometimes borrow or steal each other's clothing. He had heard rumors about the shooting, including that police were looking for witnesses, from late December 2017, until he went to jail in early 2018. That is why he assumed Baker had come to the jail to interview him about Mel and his girlfriend. The night after the shooting, when he was approached by an officer and asked about the incident, Andre said he did not see anything, which was the truth. He agreed that his motive in telling Baker about rumors he had heard about the killing was to give police the idea he knew something so that he could maybe make a deal to get out of jail sooner and to make him look good regarding his parole violation. Andre had previously testified under oath in this matter in April 2018, and had said he did not see any portion of the altercation. Other than hearing a backfire or a shot, he did not see anything connected with this case due to his back being to San Pablo.

Candace testified that on December 23, 2017, she was living in a tent in Oakland, in the area of West Grand, San Pablo, and Brush. Sometime before 10:00 p.m., just before she planned to leave for work, she was in the tent with

her boyfriend, appellant, when the tent shook. Appellant looked out the window of the tent, saw someone leaving, and "screamed, 'hey, who is that?' " Appellant then left the tent and, after locking up the tent, Candace followed. When she caught up with appellant about a half block from the tent, on 23rd Street between Brush and West, appellant was "[e]xchanging words in a heated conversation," apparently with the person who shook the tent. The two men agreed to fight, and appellant removed his jacket and handed it to Candace. The jacket did not have a hood and opened in the front. The fight lasted around three minutes and ended when the other man, who appellant had pinned to the ground, said, " 'okay. I give,' " and appellant let him get up. Candace did not see any punches thrown during the fight; it was "[m]ore of a wrestling match." She knew that appellant had wrestled in high school. She believed she returned appellant's jacket to him right after the fight.

Candace and appellant then started walking back to their tent. Candace glanced over her shoulder and saw that the man appellant had fought with was trailing them. When she told appellant that the man was following them, he turned around and faced the man. As the man continued to follow them, she saw appellant walk backwards from the corner of Brush into the park at West Grand and Brush. Meanwhile, Candace started walking back to the tent. She had reached the intersection of Brush and West Grand, about 40 feet away from appellant, when she heard a gunshot, apparently coming from the park. She turned around and saw both appellant and the man in the park; they were about 15 feet apart. Candace saw the man turn around and start walking back toward where the fight had taken place near the intersection of 23rd and Brush. She could tell that he had been shot. Candace ran toward appellant and said, "let's move out of the way. Let's get from right here." They then left the area, walking up West

Grand to Martin Luther King Jr. Way. Appellant was walking faster than she was, so he got ahead of her, but she eventually caught up with him near the tent area. Lots of people surrounded them, asking if they knew what had happened, since they were coming from the direction of the gunshot.

Candace did not tell anyone anything. She and appellant never had a conversation about what had happened that night. Where Candace comes from, people do not discuss things like that. It is also frowned upon to talk to the police or testify in court, and people who do so are sometimes called a snitch. She recognized some of the people in the courtroom as being from the neighborhood. She knew the majority of them, a few of whom were associates of appellant.

Candace acknowledged that she was interviewed by Sergeant Baker on April 1, 2018, at the Oakland Police Department. She testified that she was not sure if she told Baker that appellant had asked for his jacket as the victim approached because she was under the influence of heroin when she spoke to Baker and she was presently unclear as to exactly what she said that day. She had used heroin in the police department bathroom just before the interview with Baker.[2]

The prosecutor then played portions of a DVD of the April 1, 2018 police interview for the jury, and asked Candace questions related to each portion played. Candace acknowledged that in the interview, contrary to her trial testimony, she told Baker that appellant had said to her, " 'give me my jacket. Give me my jacket' " just before the shooting, and that, then, " 'all of a sudden, he turned around and shot him.' " In the interview, she had also

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[2] Candace testified that she was not intoxicated during her testimony at trial. When the prosecutor noted she was having trouble staying awake, she said it was because she was a heroin addict, and she had last used heroin the night before.

responded twice in the negative when Baker asked if appellant had said anything before shooting Johnson.[3] Candace also confirmed at trial that she reviewed a map during the police interview and had circled a portion of the map where she indicated that the shooting took place. Candace further confirmed at trial that Baker had shown her a photo of appellant during the interview and asked, " 'is this the same guy that you'd seen shot [*sic*] Johnson here,' " to which Candace had responded by nodding.[4]

Candace confirmed that at the end of the interview, after she had made all of the statements in the portions of the interview shown to the jury, Baker showed her the surveillance video from the night of the shooting. Candace testified that the location shown in the video appeared to be the park at West Grand and Brush. Candace recognized herself as one of two figures walking

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[3] Specifically, the interview transcript reflects that Candace told Baker that appellant grabbed his "coat" before rushing out of the tent after the victim had shaken it, and that he took off the jacket just before the initial fight with the victim and gave it to her to hold. Her statement is somewhat unclear about the exact timing of appellant's request for the jacket. For example, she stated that when they got to the corner, appellant said, " 'Give me my jacket—give me my jacket.' " She gave the jacket back to him while they were still walking and the victim was following them. She said that after she gave appellant his jacket, he did not say anything to the victim before shooting him. However, just before they got to the location of the shooting, appellant asked the victim, " 'Why you followin' me?' " The victim then said, " 'Let's go again,' "—meaning he wanted to fight again—and appellant said, " 'You just asked to get up.' " Candace further told the officers, "So it was, like, yellin' and then—then the gunshot, uh—just everything just kinda, uh, that took place and everything just kinda chaotic right there . . . ." Candace believed the gun must have been wrapped up in appellant's jacket, which was folded up while she was holding it for him. The hoodie that dropped on the ground at the corner also could have been wrapped up in appellant's jacket.

[4] On cross-examination, Candace testified that she believed the nod she made at that point was "from the heroin use."

from left to right on the screen; she was the person on the left closest to the intersection and the other person, in darker clothing, was appellant. She testified that an exchange on the corner shown in the video was her giving appellant his jacket. Candace testified that a third person wearing a white shirt subsequently shown onscreen in the surveillance video was the person who was shot.

On cross-examination, Candace testified that her eyesight is bad and it is hard for her to see at night. In the area where the shooting occurred, some parts were dark and some were well lit. She also testified that she was nodding off at the start of the police interview with Baker because she was under the influence of heroin and because it was after 1:00 in the morning. She was also frightened to be there because Baker implied that she was involved somehow in the shooting. Candace had initially denied that she was present or had seen anything. Baker had then said he knew she was lying because the police had her on surveillance video, but she continued to deny being present, saying she was on a date. Candace testified on cross-examination that she only knew who was who on the surveillance video because Baker had told her. She also denied that anyone in the audience in the courtroom had threatened her about testifying at trial or that anyone on the street had called her a snitch.

On redirect examination, Candace acknowledged that after the lunch break that day, her testimony had "started to deviate drastically" from what she had said to Baker during the police interview, but she denied that something had happened over the lunch break that made her want to tell a different story. Candace acknowledged that the officers did not show her the surveillance video until the very end of her interview. When the prosecutor asked how she had "describe[d] everything that was eventually shown in that

video to happen before seeing the video," Candace responded, "Because that's what transpired." She also acknowledged that during the interview, every time the officers accused her of lying when she told them she was not present at the shooting scene, the officers were correct.

DISCUSSION

I. *Accomplice Testimony*

Appellant contends his murder conviction violated his constitutional right to due process because it was based on the uncorroborated testimony of Candace, who was an accomplice as a matter of law.

"Section 1111 prohibits a defendant from being convicted on the uncorroborated testimony of an accomplice. Accomplice testimony must be corroborated by 'other evidence as shall tend to connect the defendant with the commission of the offense. . . . [¶] An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' (§ 1111.) . . . [¶] Unless there can be no dispute concerning the evidence or the inferences to be drawn from the evidence, whether a witness is an accomplice is a question for the jury. On the other hand, the court should instruct the jury that a witness is an accomplice as a matter of law when the facts establishing the witness's status as an accomplice are ' " 'clear and undisputed.' " ' [Citations.]" (*People v. Williams* (2008) 43 Cal.4th 584, 635–636.)

The evidence corroborating an accomplice's testimony "may be slight, entirely circumstantial, and entitled to little consideration when standing alone. [Citations.] It need not be sufficient to establish every element of the charged offense or to establish the precise facts to which the accomplice testified. [Citations.] It is 'sufficient if it tends to connect the defendant with

the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Valdez* (2012) 55 Cal.4th 82, 147–148 (*Valdez*); accord, *People v. Williams*, *supra*, 43 Cal.4th at p. 638.)

In the present case, even assuming Candace was an accomplice as a matter of law, we find that the record contains sufficient corroborating evidence that tends to connect appellant to Johnson's murder " 'in such a way as to satisfy the jury that [Candace] was telling the truth.' " (*Valdez, supra,* 55 Cal.4th at p. 148.)

First, Andre was a reluctant witness at trial who testified that he did not see appellant in the area on the night of the shooting and that he had lied during the police interview. However, in statements previously made to Baker and admitted into evidence at trial, Andre directly implicated appellant in the shooting, corroborating both Candace's statements to police and her trial testimony. (See *Valdez*, *supra*, 55 Cal.4th at pp. 147–148.)

In particular, at the very start of the February 1, 2018 police interview, before Baker could explain the reason for the interview, Andre asked, "This is about Melvin and what's her name?" He told the officers that when he was at the bus stop on the night of the shooting, "I heard them arguing and I seen Mel and, uh, his girlfriend walk . . . and I guess him—him and the dude was fighting. . . .[5] The next thing I knew, I heard one shot . . . and [Mel] an[d] his girlfriend started walking' by." Andre saw the victim "f[a]ll once" and "then he ran over here. That's where he fell again." Mel's girlfriend "was right there with him." Andre had originally seen Mel and his girlfriend coming from the direction of their tents. He then said, "I guess they had . . . some

[5] Andre confirmed that he heard, but did not see, appellant and the victim arguing. He did not hear what they were saying. He did not know the victim, but had heard he worked in the area.

kind of confusion—altercation going on. I don't know what it was about . . . [¶] . . . But then they walked back, they walked—they were standin' right here. [¶] . . . . [¶] That's when I heard a shot." After the victim fell down on Brush Street, Andre saw Mel and his girlfriend walk by. He heard Mel say something like, " 'Come on,' " to his girlfriend, and they walked away down West Grand.

During the interview, Andre had identified photographs of appellant, whom he knew as "Mel," and his girlfriend, whose name was "[Candace]." After identifying the photo of "Mel," Andre responded in the affirmative to Baker's question, "That's the dude that shot the boy?" He also said that he did not see Candace fighting with the other two men during the altercation and saw no punches thrown. Nor did he hear anything specific that either man said, saying, "Nope. I just heard a shot. One shot."

Despite the fact that Andre did not want to testify at trial and attempted to repudiate his prior statements to police, those statements constituted evidence that corroborated Candace's interview statements and trial testimony, particularly with respect to her statements and testimony that appellant shot Johnson. While differing in some details, Andre's statements to police were, overall, quite similar to those of Candace regarding what happened, and when and where it happened, and clearly showed appellant's connection to the crime in a way that satisfied the requirement for corroboration of accomplice testimony in that it " 'tend[ed] to connect [appellant] with the crime in such a way as to satisfy the jury that the accomplice [Candace] is telling the truth.' " (*Valdez*, *supra*, 55 Cal.4th at pp. 147–148 [corroborating evidence need not establish every element of charged offense or establish precise facts to which accomplice testified].)

Second, the surveillance video footage, while too grainy to show the faces of the three figures depicted, showed three individuals behaving in a specific way at a specific location consistent with Candace's statements and testimony, and also showed one individual dropping the hooded black sweatshirt that was subsequently recovered. The video footage also constituted evidence supporting Andre's description to police of where the confrontation took place, what happened when, and the people involved, adding strength to his statements corroborating the evidence provided by Candace regarding the circumstances of the shooting. Indeed, as the prosecutor stated during closing argument as an example of how the surveillance video supported Andre's testimony, Andre "was talking about both times he saw the victim fall. First initial shot, and then stumbling out into the street and falling out there." The prosecutor also told the jury that it should start its deliberations with the surveillance video, to "look at people's relative heights relative sizes, their builds," noting that the jury had seen the people depicted (i.e., appellant and Candace) in the courtroom and knew what they looked like.

Third, both Andre's statements and the surveillance video footage provided evidence that appellant fled from the scene just after the shooting,[6] which "supports an inference of consciousness of guilt and constitutes an implied admission, which may properly be considered as corroborative of the accomplice testimony." (*People v. Williams* (2013) 56 Cal.4th 630, 679; accord, *People v. Zapien* (1993) 4 Cal.4th 929, 983.) Even if, as appellant argues, a defendant's flight alone is insufficient to corroborate an accomplice's testimony, here, there is additional, stronger corroboration to which the evidence of flight only adds.

[6] The court gave a flight instruction to the jury during trial.

Finally, the DNA evidence from the black hooded sweatshirt—which appeared on the street corner in the surveillance video footage, dropped by one of the two figures shown walking by in the video—showed that appellant was the habitual wearer of that sweatshirt. Again, while not proving, on its own, that appellant committed the shooting, the sweatshirt evidence provides additional corroboration for Candace's statements and testimony regarding what took place that night and appellant's involvement in the crime. (See *Valdez*, *supra*, 55 Cal.4th at p. 147 ["Corroborating evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone"].)

Appellant nonetheless insists that "the entirety of the prosecution's case was based on [Candace's] testimony." This claim is belied both by the other evidence discussed above, as well as by the prosecutor's comments in his final closing argument, in which he described listening to defense counsel's argument: "but I didn't hear [counsel] mention Dwayne [*sic*] [Andre] once. There is a whole other person that was in this case that said [appellant] was the one arguing with the victim on the street corner with Candace standing by. Yes. If it was just Candace that you had to rely on to reach a conclusion in this case, that may be problematic; however, you have an abundance of surrounding circumstances that which [*sic*] you can measure her reliability. You have [Andre's] statement, you have Candace's statement. They seem to follow the same track, describe the same incident."

In sum, assuming Candace was an accomplice as a matter of law, the record contains more than "slight" evidence corroborating her statements to police and her trial testimony. This other evidence plainly connects appellant with the commission of the crime "in such a way as to satisfy the jury that

[Candace was] telling the truth" when she implicated appellant as the shooter. (*Valdez*, *supra*, 55 Cal.4th at pp. 147, 148; see also § 1111.)[7]

II. *Trial Court's Failure to Give Accomplice Instructions*

Appellant contends the trial court erred when it failed to instruct the jury sua sponte that the testimony of an accomplice must be corroborated by independent evidence and should be viewed with caution.

" 'The general rule is that the testimony of all witnesses is to be judged by the same legal standard. In the case of testimony by one who might be an accomplice, however, the law provides two safeguards. The jury is instructed to view with caution testimony of an accomplice that tends to incriminate the defendant. It is also told that it cannot convict a defendant on the testimony of an accomplice alone.' [Citations.]" (*People v. Williams* (2010) 49 Cal.4th 405, 455–456; see CALCRIM Nos. 334 & 335 [accomplice testimony must be corroborated and, if incriminating, viewed with caution].)

"Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict. [Citation.] [¶] Any error in failing to instruct the jury that it could not convict [a] defendant on the testimony of an accomplice alone is harmless if there is evidence corroborating the accomplice's testimony." (*People v. Williams*, *supra*, 49 Cal.4th at p. 456.)

In this case, again assuming that Candace was an accomplice as a matter of law, we have already found that there was sufficient evidence presented at trial corroborating her testimony and interview statements.

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[7] Given this conclusion, we also reject appellant's claim that his conviction violated his constitutional right to due process because it was based on the uncorroborated testimony of an accomplice.

(See pt. I., *ante*.) Hence, any error in failing to instruct the jury with CALCRIM Nos. 334 or 335 was harmless. (See *People v. Williams*, *supra*, 49 Cal.4th at p. 456.) Moreover, in her testimony at trial, Candace at times attempted to distance herself from the statements she made during her police interview, claiming at trial that she had been under the influence of heroin and frightened because the police had implied that she was involved in the shooting. She also acknowledged during her testimony that it is frowned upon in her community to testify in court. The jury would, therefore, "have been inclined to view her testimony with caution, even in the absence of an instruction that it do so," and any instructional error was harmless for this reason as well. (*Ibid.*)

Appellant nevertheless argues that the court's failure to give an accomplice instruction was especially damaging because it gave CALCRIM No. 301 without any modification, instructing the jury that "[t]he testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." According to appellant, this instruction is misleading where an accomplice's testimony is involved, and the court therefore should have added language explaining that, "unlike other witnesses, the testimony of an accomplice cannot prove any fact without corroboration."

First, we have already found that Candace's testimony and interview statements were sufficiently corroborated (see pt. I., *ante*) and that any instructional error related to accomplices was therefore harmless. In addition, the court instructed the jury on the need to assess witness credibility. (See CALCRIM Nos. 226 [credibility of witnesses], 315

[eyewitness identification], 318 [prior statements as evidence].)[8] Given that these instructions, together with obvious questions about Candace's credibility raised by some of her testimony and prior police statements, we find that the court's failure to modify CALCRIM No. 301 did not, even in combination with its failure to give accomplice instructions, prejudice appellant. (See *People v. Gonzales & Soliz* (2011) 52 Cal.4th 254, 304 [finding any error in failing to give accomplice instructions harmless where accomplice's testimony at trial conflicted with his prior statements to police, and jury "would have used the witness credibility instructions it was given in evaluating the truth of his testimony"].)[9]

III. *Sufficiency of the Evidence of Premeditation and Deliberation*

Appellant contends his first degree murder conviction must be reversed because there was insufficient evidence of premeditation and deliberation.

"In reviewing a criminal conviction challenged as lacking evidentiary support, the court must review the whole record in the light most favorable to

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[8] In closing argument, defense counsel spoke at length about the importance of these three instructions in determining the credibility of witnesses, particularly with respect to Candace. Regarding CALCRIM No. 301, defense counsel stated that "it is a true statement of the law that the testimony of only one witness can prove any fact. That's true. But you have to believe that witness. I don't think you can trust anything [Candace] may have said to Baker on April 1st. She wasn't under oath. She says she was under the influence. [¶] . . . . She repeatedly lied, by her own admission and the police officer's admission . . . . I say it is the law that the testimony of only one witness can prove any fact, but not when that witness is Candace."

[9] Having found that any error in failing to give accomplice instructions was harmless, we likewise reject appellant's claim that the alleged error reduced the prosecution's burden of proof and therefore violated his constitutional right to due process because it was based on the uncorroborated testimony of an accomplice. (See *Valdez*, *supra*, 55 Cal.4th at p. 148.)

the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. An appellate court must accept logical inferences the jury might have drawn from the evidence, even if the court would have concluded otherwise. [Citation.]" *(People v. Brady* (2010) 50 Cal.4th 547, 561 (*Brady*).)

Murder is the unlawful killing of a human being with either express or implied malice. (§§ 187, subd. (a); 188.) As relevant here, first degree murder includes a killing that is "willful, deliberate, and premeditated," while "other kinds of murders are of the second degree." (§ 189.)

" ' " 'Deliberation' refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] 'The process of premeditation . . . does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' " [Citation.]

' " 'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' [Citation.] A reviewing court normally considers three kinds of evidence to determine whether a finding of premeditation and deliberation is adequately supported—preexisting motive, planning activity, and manner of killing—but '[t]hese factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation.' " ' [Citation.]" (*Brady*, *supra*, 50 Cal.4th at pp. 561–562, quoting *People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).) These three factors, identified by our Supreme Court in *Anderson* and often referred

to as the *Anderson* factors, "are merely a framework for appellate review; they need not be . . . afforded special weight, nor are they exhaustive. [Citations.]" (*Brady*, at p. 562.)

Applying the *Anderson* factors in this case, and reviewing the record in the light most favorable to the judgment, we conclude the record contains substantial evidence of premeditation and deliberation. (*Brady*, *supra*, 50 Cal.4th at p. 561.)

First, as to evidence of *planning*, in interview statements and trial testimony, Candace indicated that in response to Johnson shaking his tent, appellant grabbed his jacket and rushed out of the tent to go after Johnson. She also said that appellant took off his jacket just before the initial fight with Johnson and gave it to her to hold. Later, according to Candace, when appellant realized that Johnson was following them, he said, " 'give me my jacket. Give me my jacket.' " She gave him his jacket, which she believed contained the gun, and then, " 'all of a sudden, he turned around and shot [Johnson].' " Candace stated that the actual shooting took place after appellant had backed into the park and Johnson had approached, while appellant and the victim were about 15 feet apart.

Appellant's conduct—initially arming himself with a gun, which was likely concealed inside the jacket he took with him when he left the tent to go after Johnson; later demanding the jacket back from Candace when he realized that Johnson was following them; and then backing into the park and waiting until Johnson approached to within 15 feet to shoot him—all provides evidence of planning activity from which a jury could infer that he considered the possibility of using the gun from the time he first left his tent and that he had decided to shoot Johnson when he told Candace to give him his jacket, after becoming aware that Johnson was following them. (See, e.g.

People v. Romero (2008) 44 Cal.4th 386, 401 [defendant bringing a weapon to location of shooting demonstrated planning activity]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 ["That defendant armed himself prior to the attack 'supports the inference that he planned a violent encounter' "]; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224 [evidence of planning activity included defendant "carrying a loaded gun with him at the time of the incident," recognizing victim from a prior altercation, and throwing his gang sign and yelling his gang name before opening fire on victim's truck].)

Appellant argues that this case is different from others involving a defendant arming himself before a killing because, here, appellant "was armed during Johnson's initial aggression, and requested his jacket for protection as he was returning to his tent when Johnson aggressed him a second time. . . . [T]here was no time for reasoned reflection given the sequence of rapidly-occurring events." First, appellant's presentation of possible alternative scenarios and mental states, even assuming the jury could have reasonably made such inferences, does not negate the substantial evidence of planning presented at trial. (See *Brady*, *supra*, 50 Cal.4th at p. 565 ["The mere *possibility* of a contrary finding as to defendant's mental state does not warrant a reversal of the guilt judgment"].)

In addition, that appellant demanded his jacket, which contained the gun, a short time before the shooting does not show a lack of premeditation and deliberation. (See *Brady*, *supra*, 50 Cal.4th at p. 561 [process of premeditation does not require an extended period of time and true test is not duration of time, but extent of reflection].) Rather, as noted, the evidence shows that appellant purposefully brought the jacket containing the gun when he first went to confront Johnson, the person who shook his tent. His subsequent conduct, after the first altercation when he learned that Johnson

was following him, included the demand for his jacket and pulling out the gun before walking backward into the park, aiming, and shooting at Johnson. All of these actions are consistent with appellant having the opportunity to reflect and making a decision to shoot Johnson before he did so. (See *ibid.*) Accordingly, we find there was substantial evidence that appellant planned to murder Johnson. (See *Brady*, at pp. 561–562.)

Second, as to evidence of *motive*, Candace's videotaped statements and testimony show that appellant became upset when someone—who turned out to be Johnson—shook his tent. Appellant then chased after Johnson, exchanged heated words with him, and got into a physical altercation that ended when appellant pinned Johnson to the ground. Then, as appellant and Candace walked away, appellant became aware that Johnson was following them. According to Candace's statement, shortly before they arrived at the location of the shooting, appellant asked Johnson why he was following them, and Johnson said, " 'let's go again,' " to which appellant responded, " 'You just asked to get up.' " Andre also heard appellant and Johnson arguing before he heard the gunshot. This evidence of Johnson's initial conduct and the resulting conflict between the two men is sufficient to demonstrate that appellant had a motive for murdering him: to punish Johnson for his disrespectful behavior. (See *People v. Gunder* (2007) 151 Cal.App.4th 412, 423–424 [evidence of a recent dispute and "a reservoir of bad blood towards the victims" was sufficient to show defendant's motive in murders].)[10]

[10] Appellant points out that no evidence demonstrated that he had "a previous desire to kill Johnson, or that the two had ever met prior to the night of the shooting." These facts in no way undermine the evidence of motive, based on what took place from the time Johnson shook the tent until appellant shot him in the chest. (Cf. *People v. Villegas*, *supra*, 92 Cal.App.4th at p. 1224 ["Defendant need not have planned to kill [the victim] before he saw him on the day of the incident"].)

Third, as to *manner of killing* evidence, Candace's and Andre's statements and testimony, as well as the autopsy and surveillance video evidence, demonstrate that, as Johnson followed appellant and Candace, appellant demanded his jacket from Candace at the corner of West Grand and Brush; retrieved the gun; walked backwards into the nearby park; and waited until Johnson approached before shooting him in the middle of the chest from approximately 15 feet away. Considering their wrestling match a few minutes earlier, which appellant won handily, there was no apparent reason for appellant to be concerned that Johnson had a gun or was a threat. Rather, the evidence shows that appellant waited for Johnson and then fired directly at a vulnerable part of Johnson's body from close range, which is sufficient to support a finding that the manner of killing reflected premeditation and deliberation. (See, e.g., *People v. Halvorsen* (2007) 42 Cal.4th 379, 422 [victims "were shot in the head or neck from within a few feet, a method of killing sufficiently ' "particular and exacting" ' to permit an inference that defendant was "acting according to a preconceived design"]; *People v. Morris* (1988) 46 Cal.3d 1, 23 ["The fact that defendant shot the victim twice from close range could reasonably support an inference by the jury that the manner of killing was ' "particular and exacting." ' "], disapproved on another ground by *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5; cf. *People v. Silva* (2001) 25 Cal.4th 345, 369 ["The manner of killing—multiple shotgun wounds inflicted on an unarmed and defenseless victim who posed no threat to defendant—is entirely consistent with premeditated and deliberate murder]; compare *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1260, 1269–1270 [even though gun was fired at close range at victim's head, there was evidence that defendant and victim were joking around with gun when it went off and there was no evidence of planning or

motive; hence, evidence was insufficient to support a finding that manner of killing showed premeditation and deliberation].)

Although the evidence of premeditation and deliberation in this case was not overwhelming, the evidence presented and the logical inferences the jury could have drawn from that evidence constitute substantial evidence such that a reasonable trier of fact could find that appellant's decision to kill Johnson was the result of premeditation and deliberation. *(Brady*, *supra*, 50 Cal.4th at p. 561.)

IV. *Trial Court's Failure to Instruct on Voluntary Manslaughter*

Appellant contends the court erred when it failed to instruct the jury on voluntary manslaughter as a lesser included offense of murder. Specifically, he argues that the court was required to instruct the jury sua sponte on the theories of imperfect self-defense (CALCRIM No. 571) and provocation/heat of passion (CALCRIM Nos. 522, 570) because there was substantial evidence presented at trial supporting such instructions.

"California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence," which, in a murder prosecution, includes "the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." *(People v. Breverman* (1998) 19 Cal.4th 142, 148–149.) However, " '[s]uch instructions are required only where there is "substantial evidence" from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citation.]' " (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.)

Here, at the start of trial, the prosecutor requested the imperfect self-defense instruction (CALCRIM No. 571), but later withdrew the request. Defense counsel initially requested that the court instruct on provocation and heat of passion (CALCRIM Nos. 522, 570), but withdrew the request after appellant objected. In addition, the court found there was not substantial evidence in the record warranting instructing the jury on either imperfect self-defense or heat of passion voluntary manslaughter as a lesser included offense of murder.

On appeal, we review de novo the trial court's decision not to give a particular instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584 (*Manriquez*).)

A. *Heat of Passion*

" 'Murder is the unlawful killing of a human being . . . with malice aforethought.' (§ 187, subd. (a).) When a person kills while acting 'upon a sudden quarrel or heat of passion' [citation] even if exercising a sufficient 'measure of thought . . . to form . . . an intent to kill'—he or she acts with 'a mental state that precludes the formation of malice.' [Citations.] Thus, the offense of murder is reduced to the lesser included offense of voluntary manslaughter when the defendant acted upon a sudden quarrel or in the heat of passion. [Citation.] A person acts upon a sudden quarrel or in the heat of passion if he or she 'acts without reflection in response to adequate provocation.' [Citation.] Provocation is legally adequate if it ' " 'would cause the ordinarily reasonable person of average disposition to act rashly and . . . from . . . passion rather than from judgment.' " ' [Citation.]" (*People v. Peau* (2015) 236 Cal.App.4th 823, 829–830 (*Peau*), citing *People v. Beltran* (2013) 56 Cal.4th 935, 942.)

We have serious doubts that there was substantial evidence in this case that appellant acted in the heat of passion, which would require the court to instruct sua sponte on voluntary manslaughter under that theory. Appellant may well have been angered by Johnson shaking the tent, in which appellant and Candace lived; by the subsequent wrestling match, during which, as Candace testified, no punches were thrown and appellant was able to quickly pin Johnson to the ground; and by the fact that Johnson subsequently followed him, saying, " 'Let's go again.' " Nonetheless, we find it highly unlikely that this series of events, no matter how frustrating, " ' " 'would cause the ordinarily reasonable person of average disposition to act rashly and . . . from . . . passion rather than from judgment.' " ' " (*Peau*, *supra*, 236 Cal.App.4th at p. 830.)

Moreover, assuming the evidence *was* sufficient to warrant a heat of passion instruction, we find that any error in the court's failure to give such an instruction was harmless under any standard of prejudice. (See *Peau*, *supra*, 236 Cal.App.4th at p. 830 ["For our purposes, it is not necessary to decide which standard of prejudice applies because any error was harmless even under the more stringent *Chapman* [*v. California* (1967) 386 U.S. 18, 24] standard"]; accord, *People v. Franklin* (2018) 21 Cal.App.5th 881, 891 (*Franklin*).)

" 'Error in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to [the] defendant under other properly given instructions.' [Citation.]" (*Peau*, *supra*, 236 Cal.App.4th at p. 830, citing *People v. Lewis* (2001) 25 Cal.4th 610, 646.)

In *Peau*, Division One of this District reconciled the tension between two Supreme Court cases—*People v. Berry* (1976) 18 Cal.3d 509 and *People v.*

Wharton (1991) 53 Cal.3d 522)—ultimately relying on *Wharton*, in which our Supreme Court had "determined that by returning a [first degree murder] verdict, 'the jury necessarily found [the] defendant premeditated and deliberated the killing,' a 'state of mind, involving planning and deliberate action [that] is manifestly inconsistent with having acted under the heat of passion.' [Citation.]" (*Peau*, *supra*, 236 Cal.App.4th at p. 831, quoting *Wharton*, at p. 572.) The court in *Peau*, following the reasoning in *Wharton*, likewise concluded that because the jury had been instructed on first degree murder under a theory of premeditation and deliberation pursuant to CALCRIM No. 521, the defendant's "conviction of first degree murder render[ed] any failure to give a heat-of-passion instruction harmless because the jury necessarily found that the murder was willful, deliberate, and premeditated." (*Peau*, at p. 830; accord, *Franklin*, *supra*, 21 Cal.App.5th at p. 894 ["the jury's finding of premeditation and deliberation is 'manifestly inconsistent with having acted under the heat of passion' and nullifies any potential for prejudice here"]; but see *People v. Ramirez* (2010) 189 Cal.App.4th 1483, 1487–1488 [finding that respondent's claim that first degree murder conviction rendered court's failure to give heat of passion instruction harmless "fail[ed] as a matter of law" under *Berry*].)

Here, the jury found appellant guilty of first degree murder after being instructed with CALCRIM No. 521,[11] the same instruction given in *Peau* and

[11] CALCRIM No. 521 provides in relevant part: "The defendant is guilty of first degree murder if the People have proved that (he/she) acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if (he/she) intended to kill. The defendant acted *deliberately* if (he/she) carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant *acted with premeditation* if (he/she) decided to kill before completing the act[s] that caused death.

identical in relevant part to the attempted murder instruction (CALCRIM No. 601) given in *Franklin*, both of which define premeditation and deliberation and distinguish premeditation and deliberation from "a decision to kill made rashly, impulsively, or without careful consideration." (CALCRIM Nos. 521, 601.) Thus, in convicting him of first degree murder, the jury necessarily found that appellant did not " ' " 'act rashly and . . . from . . . passion rather than from judgment.' " ' " (*Peau*, *supra*, 236 Cal.App.4th at p. 830; see also *Franklin*, *supra*, 21 Cal.App.5th at p. 894.) We agree with the reasoning of the appellate courts in *Peau* and *Franklin*, and conclude the court's failure to give a heat of passion instruction was harmless beyond a reasonable doubt. (See *Peau*, at p. 832; see also *Franklin*, at p. 891.)

B. *Imperfect Self-Defense*

" ' "Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." [Citation.] . . . [Citation.] [I]mperfect self-defense is not an affirmative defense, but a description of one type of voluntary manslaughter. Thus the trial court must instruct on this doctrine, whether or not instructions are requested by counsel, whenever there is evidence substantial enough to merit

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"The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time."

consideration by the jury that under this doctrine the defendant is guilty of voluntary manslaughter. [Citation.]' " (*Manriquez*, *supra*, 37 Cal.4th at p. 581; see § 187, subd (a).)

The doctrine of imperfect self-defense " 'is narrow. It requires without exception that the defendant must have had an *actual* belief in the need for self-defense. . . . Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury. " '[T]he peril must appear to the defendant as immediate and present and not prospective or even in the near future. *An imminent peril is one that, from appearances, must be instantly dealt with*.' " ' " (*Manriquez*, *supra*, 37 Cal.4th at p. 581.)

In this case, the evidence presented at trial shows that, once appellant caught up to Johnson after Johnson shook his tent, he quickly pinned Johnson to the ground during their agreed upon wrestling match, before letting Johnson get up. There was not even a hint that Johnson was in possession of a weapon throughout the encounter between the two men, including when Johnson approached appellant in the park, when appellant pointed a gun at him, or when appellant then shot him in the chest at close range. The record thus contains no evidence substantial enough to support a finding that appellant actually feared that Johnson posed an " '*imminent* danger to life or great bodily injury' " that " ' " 'must be instantly dealt with.' " ' " (*Manriquez*, *supra*, 37 Cal.4th at p. 581; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 621 [no state or federal constitutional error occurs, requiring reversal for failure to instruct the jury regarding a lesser included offense, when the evidence in support of that offense "was, at best,

extremely weak"].) The court, therefore, did not have a duty to instruct sua sponte on imperfect self-defense.[12]

In any event, "[t]he jury's verdict finding [appellant] guilty of the first degree murder of [Johnson] implicitly rejected [his] version of the events, leaving no doubt the jury would have returned the same verdict had it been instructed regarding imperfect self-defense. [Citation.] Accordingly, even if we were to assume the failure to instruct on imperfect self-defense violated [appellant's] constitutional rights, we would find the error harmless. [Citation.]" (*Manriquez*, *supra*, 37 Cal.4th at pp. 582–583, citing *People v. Lewis*, *supra*, 25 Cal.4th at p. 646; compare *People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1179 [cited by appellant, in which appellate court found

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[12] Appellant claims that the court should have considered his homelessness and its effect on his belief in the need to use lethal force in deciding whether to instruct on imperfect self-defense. He cites *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 747, 756 (*Sotelo-Urena*) in which a panel of this Division held that the trial court prejudicially erred in excluding expert testimony that "a homeless individual who has repeatedly been subjected to violence and the threat of violence will experience a heightened sensitivity to such threats and will have a reduced threshold at which he or she subjectively perceives an imminent threat," in light of studies on chronic homelessness showing that "homeless individuals are victims of violent crime at a much higher rate than the general population."

This case, unlike *Sotelo-Urena*, does not involve the court's refusal to allow the defense to present expert testimony on the possible effect of appellant's homelessness on his perception of danger. Nor does appellant cite any evidence in the record suggesting that he had been repeatedly subjected to violence or the threat of violence, causing him to perceive heightened threats. (Compare *Sotelo-Urena*, *supra*, 4 Cal.App.5th at pp. 747, 756–757 [expert's testimony would have supported other evidence regarding dangers of being homeless and would have "bolstered the credibility of defendant's statements in his two police interviews that he actually perceived an imminent threat of death or great bodily harm when [victim] aggressively approached him in the darkened alleyway wielding an object that defendant mistook for a knife"].)

trial court should have instructed sua sponte on imperfect self-defense where "prosecution's chief witness against appellant testified [the victim] was choking appellant when appellant drew his gun and shot [the victim]" because, in light of that evidence, "[i]t was for the jury sitting as the trier of fact to decide whether appellant actually feared serious injury or death from being choked"].)

V. *Spectator Misconduct*

Appellant contends the court abused its discretion when it denied his new trial motion based on spectator misconduct.

A. *Trial Court Background*

At trial, Candace's testimony differed in some ways from her statements during her police interview with Baker. She claimed at trial that she did not remember the details of the interview because she was under the influence of heroin at the time and that, where she comes from, it is frowned upon to talk to the police or testify in court and that people who do so can be called a snitch. She further testified that she recognized some of the people in the courtroom as being from the neighborhood and that she knew the majority of the people in the audience, a few of whom were associates of appellant.

Over the course of the trial, the court responded to three instances of spectator misconduct. During each episode, the court spoke to the audience in the courtroom outside the presence of the jury.

First, just after Officer Breznick finished testifying, the court excused the jurors for their morning recess. The court then asked counsel to stay in the courtroom while it addressed the people in the audience. The court proceeded to tell appellant's sister what it said had already been pointed out to "everyone else, that you can't have any kind of communication whatsoever

during court with the defendant. Not suggesting that you did; I'm just giving you the rules of the court. The law doesn't allow anyone to communicate with anybody in custody, that means no waving, no verbal or nonverbal communication." The court then addressed the relatives of the victim who were in the courtroom, expressing condolences, but also stating that "this is [the] time and place to allow the criminal justice system to do what it does. And so, just need cool heads, you know, and can't have any kind of outburst in the courtroom . . . I can't allow that."

Second, during the direct examination of Andre, the court asked the jury and Andre to leave the courtroom and again addressed the audience. The court stated: "You cannot continue [to] walk in and out, sit down willy-nilly. It's distracting to the court. And if it's distracting to me, it could be distracting to this witness, because I don't know what your relationships are with one another, but I do know that this man is going to testify with the ability of this jury to listen objectively to what he has to say. And if you are distracting from the proceedings on this side of the bench, then you are going to leave. . . . I don't want to see you communicating with each other. I don't want to see you talking to one another. This is not musical chairs in this courtroom. And if you cannot do that, get out."

Third, just after the start of the direct examination of Candace, the court directed Candace and the jury to briefly leave the courtroom. It then asked a member of the audience who she was and the audience member said she was Candace's sister. The court asked whether something was said to her while Candace was testifying, and she responded that appellant's sister had looked at her and she looked back at appellant's sister, who then asked "who I was looking at." The court ordered appellant's sister out of the courtroom. The court again admonished the rest of the audience that if

anyone could not conduct themselves in an orderly manner, they would be told to leave. It also stated: "It's important for the fairness of this process that this jury not see or hear anything that anyone may personally think or believe about the proceedings."

The prosecutor then made the request that, "besides the people here associated with the victim or in support of [Candace], I would ask that everyone else be moved to the defendant's side of the audience" because "there's a direct line of sight to the witness stand from this side of the courtroom. I believe there's been a lot of misconduct that the court has already commented on going on directly in her line of sight." The court followed the prosecutor's suggestion and told people associated with the victim or Candace to sit on one side of the courtroom and people associated with appellant to sit on the other side.

In addition to the court's three admonitions involving spectators, the court subsequently addressed with counsel a separate issue involving one of the jurors. Juror No. 35 had contacted the court, who subsequently spoke to the juror by telephone. During that conversation, the juror said she had recognized two men in the courtroom audience who were associated with appellant. She had realized she knew them from the area near where the offense took place because her mother lived in the area and she also frequented a hairdresser in the area. She had seen the two men hanging out in front of a nearby store. The court recounted that the juror had expressed concern for her safety and her mother's safety "if, in fact, there is an adverse decision in this case. She feels that there may be repercussions that could come, and she would be leery, and she would not want to serve on this jury." Juror No. 35 had also said she felt that the people in the courtroom who lived in the neighborhood had been looking at her, and she was not sure the

situation would not impact her. The court ultimately excused Juror No. 35 for good cause and replaced her with an alternate juror.

After the jury found appellant guilty of first degree murder, defense counsel moved for a new trial on the ground that "[s]pectator behavior perceived by the jurors as coercing witness [Candace] denied him a fair trial." Counsel argued that the critical evidence at trial as to the identity of the shooter came from Candace, who "recanted and back pedaled to a large extent: She testified that the police had told her who was in the video and that she lied to the police and did not see who shot Johnson." Counsel also referred to the inappropriate behavior among spectators that led to the court's admonitions and the removal of Juror No. 35, and argued that he "never objected to or noted any of this behavior" because "[h]is back was to the spectators and [he] did not see what had occurred."

In the motion, counsel further stated that after the verdict was announced, he asked the jury about "the believability of witness Candace and several jurors stated, in effect, that spectators they believed were associated with [appellant] had entered the courtroom and used facial expressions and hand gestures to threaten the witness . . . . They believed this caused her testimony to change at trial." Many other jurors "nodded in agreement" to these statements. Counsel added that "[s]everal jurors stated they believed Candace's out of court statements over her in court statements because of what the spectators were doing." Counsel argued that Candace's testimony was critical to the conviction and the jurors' perception that appellant "had confederates in the audience to influence her resulted in an unfair trial."

Counsel attached a declaration to the motion in which he did "not verbatim quote jurors' remarks on the influence that the spectators had on jurors' verdicts," and stated that, if the court found the declaration

insufficient, appellant would request an evidentiary hearing on the issue. In the declaration, counsel further stated that he "inquired as to the credibility of Witness . . . . In reply, at least two jurors commented to the affect [*sic*] that they were influenced to believe [appellant] was guilty by the actions of spectators glaring at and making gestures to [Candace] while she testified. Other jurors nodded in agreement. On[e] juror remarked that they assumed these people were 'supporters' of [appellant]."

For his part, the prosecutor wrote in a sentencing letter to the court that 8 to 10 of appellant's "associates" were in the courtroom on days when "civilian" witnesses testified, "spread out through the courtroom, making themselves visible no matter where a witness or jury member looked. [The court] had to excuse the jury and admonish the audience multiple times to not disturb the court proceedings, even kicking out [appellant's] sister. [¶] More importantly, these tactics proved effective. Both civilian witnesses attempted to change their testimony once in the courtroom, admitted they were afraid of being labeled as 'snitches' and admitted being concerned for their safety." The prosecutor also noted that a jury member had "asked to be excused out of fear for herself and her family after observing the group in court."

At the hearing on the motion for new trial, following a colloquy between the court and both counsel, the court first noted that no juror misconduct had been alleged and then stated: "[W]hat's being alleged in this case is that their mental process is relying upon some influence by people in the audience that's not been established heretofore period [*sic*]. There was substantial evidence just viewing the first statement of the witness [Candace] to support the fact that this defendant shot this victim, and in addition, if Candace said nothing else rather than, [']The people on the videotape were the defendant,

myself, and the victim, and showed where . . . they were,[’] and certainly she said that, undisputed that she said that, the videotape shows this defendant pulling out a gun and shooting a person who no one has said had a gun, had no right to use self-defense or anything else. There is no basis in fact to suggest that some condition, statement, or conduct affected [the] jury in such a way as to cause any prejudice to this defendant such that he was [denied] a right to his fair trial."

The court also observed both that defense counsel's declaration was based on hearsay and that, even assuming the hearsay statements were true, and "that, in fact, two jurors said that they believed [appellant] was guilt[y] by the action of spectators glaring at Candace when she testified and that one said, 'Well, we thought these people were his supporters,' that still, in my mind, does not amount to any prejudice for a fair trial, given all the substantial evidence in this case to support a guilty verdict . . . .

"And so even if there were a hearing—but there is no reason to resolve that dispute because even if they say [Candace's testimony] was influenced, then the court is really looking at the mental process that they were looking at in deciding whether he was or he wasn't. And the D.A. argued that, where the defense could have certainly rebutted it. But the D.A. argued, you know, she may have changed her mind because of [*sic*]. But still, it doesn't change the fact of what the other evidence in the case actually did show. So I'm denying the motion for new trial. I do not find a basis to say that there was . . . spectator[] misconduct that impacted jurors to the point that this defendant was denied a fair trial. He had a fair and impartial trial. And there is no need, in my view, for a hearing."

B. *Legal Analysis*

"Although spectator misconduct constitutes a ground for new trial 'if the misconduct is of such a character as to prejudice the defendant or influence the verdict,' the trial court must be accorded broad discretion in evaluating the effect of claimed spectator misconduct. [Citation.]" (*People v. Cornwell* (2006) 37 Cal.4th 50, 87, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, quoting *People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) "[P]rejudice is not presumed when spectators misbehave during trial; rather, the defendant must establish prejudice." (*Cornwell*, at p. 88.)

In the present case, appellant asserts that, "[d]espite the pervasive misconduct, the court inexplicably failed to admonish jurors to disregard the spectators' actions and consider only the evidence in this case." According to appellant, without such an admonition, the spectator misconduct deprived him of a fair trial.[13]

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[13] In his briefing, appellant recounts the three instances when the court admonished the people in the audience outside of the presence of the jury, but focuses his argument on the alleged prejudice he suffered due to the misconduct that took place during Candace's testimony.

Appellant also mentions the fact that Juror No. 35 was excused for cause based on her concerns that she recognized men in the audience, who were associated with appellant, from her mother's neighborhood and that they may have also recognized her, and her concerns for her and her mother's safety in the event of a verdict adverse to appellant. To the extent appellant claims that this excused juror's experience somehow affected the rest of the jury, we observe that the court, which had spoken with Juror No. 35 on the telephone, told counsel that the juror "indicated she didn't discuss [her concerns] with anyone else." Thus, Juror No. 35's experience is not pertinent to any possible prejudice appellant suffered due to spectator misconduct during Candace's testimony.

As a preliminary matter, respondent argues that appellant forfeited this issue because counsel failed to object and request that the jury be admonished regarding the spectator misconduct that took place during Candace's testimony. Respondent cites *People v. Hill* (1992) 3 Cal.4th 959, 1000, in which our Supreme Court "ma[d]e explicit what has long been implicitly clear. A defendant's failure to object to and request a curative admonition for alleged spectator misconduct waives the issue for appeal if the objection and admonition would have cured the misconduct."

Appellant responds that counsel's failure to object and request that the jury be admonished should be excused both because the misconduct was so egregious, no admonition would have cured the harm already done and because counsel's "back was to the spectators and [he] did not see what occurred," which gave him no meaningful opportunity to object.

We agree with respondent that appellant has forfeited this issue. First, the misconduct in question was not so pervasive and egregious that a jury admonition would not have been effective. In addition, the court did what was arguably more effective: it intervened with the spectators at the start of Candace's testimony, removing appellant's sister from the courtroom, admonishing the audience, and moving people associated with Candace out of her line of sight. This case is thus clearly not analogous to *People v. Hill* (1998) 17 Cal.4th 800, 821, cited by appellant, in which the prosecutor's "continual misconduct, coupled with the trial court's failure to rein in her excesses, created a trial atmosphere so poisonous that [defense counsel] was thrust upon the horns of a dilemma. On the one hand, he could continually object to [the prosecutor's] misconduct and risk repeatedly provoking the trial court's wrath, which took the form of comments before the jury suggesting [defense counsel] was an obstructionist, delaying the trial with 'meritless'

objections. These comments from the bench ran an obvious risk of prejudicing the jury towards his client. On the other hand, [defense counsel] could decline to object, thereby forcing defendant to suffer the prejudice caused by [the prosecutor's] constant misconduct. Under these unusual circumstances, [our Supreme Court] conclude[d] [defense counsel] must be excused from the legal obligation to continually object, state the grounds of his objection, and ask the jury be admonished . . . [because] any additional attempts on his part to do so would have been futile and counterproductive to his client. [Citation.]"

Second, although counsel said that he had no opportunity to object because his back was turned to the spectators and he did not see the misconduct, the record reflects that he was nevertheless made aware that spectator misconduct was occurring during Candace's testimony when the court strongly admonished the jury, removed appellant's sister, and rearranged the spectators in an attempt to move people associated with appellant out of Candace's line of sight. At that time, the prosecutor also stated that "there's been a lot of misconduct that the court has already commented on going on directly in [Candace's] line of sight." Even if counsel's back was turned during Candace's testimony, the court's statements and actions, as well as the prosecutor's statement, would have obviously alerted him to the fact that misconduct was taking place, which gave him the opportunity to object and request an admonition to the jury early in her testimony.

We therefore conclude appellant has forfeited the claim of spectator misconduct due to counsel's failure to object and request that the court admonish the jury regarding the misconduct that took place during Candace's testimony. (See *People v. Hill*, *supra*, 3 Cal.4th at p. 1000.)

Appellant further argues that, if the issue is forfeited, counsel rendered ineffective assistance by failing to object and request an admonition. To prove ineffective assistance of counsel, a defendant must show that "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).) In addition, the defendant must affirmatively establish prejudice by showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Id.* at p. 694.) "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

As to counsel's performance, the court repeatedly admonished the spectators in the courtroom about the need to remain silent, behave appropriately, and respect the process. In particular, at the very beginning of Candace's testimony, the court removed appellant's sister from the courtroom and, at the prosecutor's suggestion, also had people associated with the victim or Candace sit on one side of the courtroom and people associated with appellant sit on the other side, to keep people associated with appellant out of Candace's line of sight. Counsel could have reasonably believed that these admonitions and actions were sufficient to address the misconduct and that

calling the jury's attention to the improper conduct of spectators associated with appellant would not be helpful to appellant.[14] Accordingly, counsel's conduct fell "within the wide range of reasonable professional assistance." (*People v. Maury*, *supra*, 30 Cal.4th at p. 389; see *Strickland*, *supra*, 466 U.S. at p. 688.)

In addition, even had appellant shown that counsel's failure to object and request an admonition was unreasonable, he has failed to show prejudice. (See *Strickland*, *supra,* 466 U.S. at p. 694.) As evidence that he was prejudiced by the spectator misconduct that took place during Candace's testimony, appellant cites to the comments of several jurors at the conclusion of trial, which defense counsel relayed to the court. In his declaration, counsel stated that at least two jurors had said "they were influenced to believe [appellant] was guilty by the actions of spectators glaring at and making gestures to Candace while she testified," that other jurors "nodded in agreement," and that one juror "remarked that they assumed these people were 'supporters' of [appellant]." Most of these comments, however, involved jurors' thought processes and were therefore not admissible to show the effect of the spectator misconduct on the jury. (See Evid. Code, § 1150, subd. (a).)

"Pursuant to Evidence Code section 1150, subdivision (a), evidence of matters that may have influenced a verdict improperly is inadmissible 'to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.' 'This statute distinguishes "between proof of overt acts, objectively ascertainable, and

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[14] Although, in the motion for new trial, counsel claimed his back was turned to the audience and he did not *see* the misconduct, as we have already explained, he was made aware of the spectator misconduct by both the court and the prosecutor.

proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved. . . . The only improper influences that may be proved under [Evidence Code] section 1150 to impeach a verdict, therefore, are those open to sight, hearing, and the other senses and thus subject to corroboration." ' [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 523–524.)

Here, the jurors' observations that people in the audience were "glaring and making gestures" at Candace during her testimony would be admissible to demonstrate spectator misconduct. (See Evid. Code, § 1150, subd. (a).) However, their statements that they were "influenced" by the actions of people they "believed" were associated with appellant, and that some jurors "believed [Candace's] out of court statements over her in court statements because of what the spectators were doing," were *not* admissible to demonstrate that appellant was prejudiced by the spectator misconduct. (See *People v. Smith*, *supra*, 40 Cal.4th at pp. 523–524.)[15]

Disregarding the inadmissible assumptions of and influences on the jury, the fact that spectators may have glared and gestured at Candace during her testimony is insufficient to show that appellant was thereby prejudiced, based on Candace testifying inconsistently with her statements to police. While it is true that Candace's trial testimony differed in certain ways from her statements during the police interview and that she tried to distance herself from some of those statements, her trial testimony still plainly implicated appellant in the shooting.

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[15] For this reason, appellant's claim that "an evidentiary hearing was required because a material factual dispute existed as to the effect of the misconduct on jurors" is without merit. Again, any such inquiry into how the spectator misconduct affected or influenced the jurors would be prohibited by Evidence Code section 1150.

At trial, Candace testified that she returned appellant's jacket to him shortly after his wrestling match with Johnson, rather than right before the shooting, and that she did not see the actual shooting, which did differ from her statements to police. However, she also testified that after she saw appellant walking backwards into the park, she heard a shot, turned around, saw appellant and the victim in the park about 15 feet apart, and could tell that the victim had been shot. Thus, while she clearly backtracked from her statements during the police interview in which she expressly identified appellant as the shooter, her testimony at trial nonetheless strongly implied that he was the shooter.

Regarding the surveillance video, Candace testified on cross-examination that she only knew who the people were in the video footage because of what Baker told her. However, she also acknowledged on redirect examination that the officers did not show her the surveillance video until the very end of her interview and, when the prosecutor asked how she had "describe[d] everything that was eventually shown in that video to happen before seeing the video," Candace responded, "Because that's what transpired."

Finally, as already discussed (see pt. I., *ante*), Candace's interview statements and testimony were corroborated by other evidence, including Andre's statements to police, the surveillance video footage, the evidence that appellant fled after the shooting, and the evidence of appellant's DNA found on the hooded sweatshirt, which the video footage showed was dropped on the ground just before the shooting.

Thus, in light of the overwhelming evidence of guilt presented at trial, appellant has not shown " 'that there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different.' " (*Strickland*, *supra*, 466 U.S. at p. 694.)

For all of the foregoing reasons, appellant's claim that counsel was prejudicially ineffective for failing to object and request an admonition regarding the spectator misconduct cannot succeed. (*Strickland*, *supra*, 466 U.S. at pp. 688, 694.)

VI. *Cumulative Error*

Appellant contends the cumulative effect of the various errors that occurred during his trial deprived him of due process and a fair trial. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 844.) Considering our resolution of the issues raised on appeal, we find that none of the alleged errors, whether alone or in combination, prejudiced him. Accordingly, there is no ground for reversal based on cumulative error.

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

People v. Allen, Jr. (A155167)